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No. 03-999

In The Supreme Court Of The United States

ROBIN B. MURPHY,

Petitioner,

v.

UNIVERSITY OF CINCINNATI, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

At most, this case would be a garden-variety Title VII case, involving the application of settled law to one factbound scenario in an unreported case below. But in fact, this case actually involves *less* than a garden-variety Title VII case, for—contrary to the misimpression in the Petition—this case does not even involve a standard sex-based termination claim.

As detailed below, Petitioner Murphy brought two narrowly-crafted Title VII counts against Respondent University of Cincinnati, and neither count alleged that she was fired because of her sex. Rather, her sex-discrimination count alleged that she received discriminatory treatment, based on her sex, in the *terms and conditions* of her employment *while on the job*, and that count deliberately and carefully excluded any claim that her firing was sex-based.

Separately, she alleged, in her "termination count," that she was fired *in retaliation for* complaining about discrimination. She was careful in her Amended Complaint to link her firing to that alleged retaliatory motive, not to core sex discrimination. A jury rejected the retaliation claim, and that claim is no longer at issue.

Because Murphy has no discriminatory-firing claim, her Petition is fatally flawed in several respects. Two of her Questions Presented are not truly presented, as they rely on the existence of a non-existent termination claim. And if the questions are considered in the context of a "terms and conditions" claim, this is a flawed case to consider those questions. That is so for several reasons, including that Murphy suffered no adverse employment action, once the firing is properly taken off the table.

Moreover, even if the Court treats this case as a discriminatory termination case, the Petition does not warrant review. The Petition does not raise any issues worthy of review, and even if some issues are interesting, this case is a poor vehicle to review those issues. For example, her case is not a good vehicle to determine what type or level of evidence amounts to sufficient "direct evidence" of discrimination, as her allegations are a weak bundle that would lose under any standard. The Petition's other issues suffer similar flaws.

For these reasons and others detailed below, the Petition should be denied.

COUNTERSTATEMENT

Petitioner Robin Murphy, a former assistant coach of the University of Cincinnati swim team, filed an amended complaint on October 15, 1997, against the University of Cincinnati (a state university), head swim coach Monty Hopkins, and former athletic director Gerald O'Dell.[1]

Murphy's Amended Complaint contained two Title VII claims—a sex-based "terms and conditions" claim, and a retaliatory-termination claim—but it did not allege that she was fired because of her sex. Her first paragraph, labeled a "Preliminary Statement," explained her two distinct claims, alleging that

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[1] While Murphy names the University and both individuals as Respondents, the only proper Respondent to the Title VII claims is the University. Murphy cites Section 1983 once in her Petition, but does not say anything to revive her Section 1983 claims against the individuals. Nevertheless, to the extent the Petition seeks to revive claims against the individuals, the term "University" is intended to refer to all Defendants-Respondents together.

> Defendants discriminated against her with respect to the *terms and conditions* of her employment as Assistant Coach for the University of Cincinnati Swim Team. More specifically, Defendants discriminated against Plaintiff by treating her in a derogatory manner because she is a woman, subjecting her to *terms and conditions* of employment different than similarly situated males, and *terminating her for protesting said discrimination.*

Amended Complaint ("Am. Compl.") ¶ 1 (emphasis added).

Murphy's statement in support of federal jurisdiction further confirmed that she raised these two distinct claims, but not a standard sex-based termination claim. She said that federal jurisdiction was "conferred by: (1) Title VII, 42 U.S.C. § 2000e *et seq.*, as amended by the Civil Rights Act of 1991, which prohibits discrimination in the *terms, conditions, or privileges* of employment *and prohibits retaliation* for participation in protected activities." Am. Compl. ¶ 2 (emphasis added). This jurisdictional statement omitted noting that Title VII, of course, makes it unlawful to "discharge any individual" based on sex. *See* 42 U.S.C. § 2000e-2.

The complaint's factual section, labeled "Statement of Claims," further continued to carefully delineate between the sex-based terms-and-conditions claim, and the retaliatory-termination claims. Paragraph 12 alleged that Murphy was subjected to "discriminatory treatment based on her sex," and that paragraph listed eight examples of such discriminatory treatment, including several allegations of harsh comments and general "mistreatment." While that paragraph included standard language that the discrimination

"included, but was not limited to" those examples, the list did not mention Murphy's firing, which was discussed elsewhere in the complaint. Paragraph 13 alleged that coach "Hopkins did not subject male assistant coaches to any of the unfair and discriminatory terms and conditions of employment to which he subjected Plaintiff."

Murphy's factual allegations next turned from the sex-based terms and conditions claim to the retaliatory-firing claim. Paragraph 14 alleged that she complained to University officials about her mistreatment, and Paragraph 15 alleged that she was fired. She alleged that the University "terminated Plaintiff in retaliation for Plaintiff complaining" about her alleged mistreatment.

Murphy's narrowly-defined legal counts, following her factual allegations, further confirmed her approach. Count One alleged a "violation of Plaintiff's rights to be free from discrimination in the terms, conditions, and opportunities for employment on account of her sex," but it did not mention the well-known terms of "discharge," "firing," or "termination." Am. Compl. ¶19. Count Two alleged a "violation of Plaintiff's right to be free from retaliation." *Id.* ¶21. Count Three, a Section 1983 claim, and Count Four, a state-law discrimination claim, both repeated Count One's language regarding terms, conditions, and opportunities in her employment. *Id.* ¶¶23, 25.

The District Court—both the Magistrate Judge and the District Court judge—treated the sex-discrimination claim as purely a non-firing terms-and-conditions claim, and granted the University summary judgment against that claim. Pet. App. 30a; Pet. Supp. App. 20a. The Magistrate found, and the district court agreed, that Murphy failed to establish three of the four elements necessary to establish a prima facie case of sex discrimination. *Id.*

Specifically, the Magistrate found that Murphy did not suffer an adverse employment action, *with regard to her terms and conditions claim* (the only claim at issue here), because the pre-firing "terms and conditions" allegations did not amount to a concrete adverse action. The Magistrate acknowledged that it could "hardly be disputed that plaintiff's discharge was an adverse employment action." Pet. Supp. App. 16a. But, because her claim was not a discriminatory termination claim, the Magistrate could not stop there. Instead, he looked to Plaintiff's "claims that she was subjected to 'other forms of material adverse job action' prior to her discharge." *Id.* The Magistrate concluded that Murphy did not satisfy the adverse-action prong for the terms and conditions claim, explaining that "[a]t most, plaintiff's allegations lead to the conclusion [that] Hopkins was somewhat gruff, dictatorial, or insensitive in his managerial style. However, plaintiff has failed to demonstrate that changes he made in her employment were anything more than a mere inconvenience or an alteration of job responsibilities." *Id.* 17a.

The Magistrate also found that Murphy was not qualified for her job, and that she was not treated less favorably than any similarly-situated male. *Id.* 20a. Accordingly, the Magistrate found that Murphy's retaliatory-firing claim should go to trial, but without any sex-discrimination claim. *Id.* 25a.

The District Court adopted and incorporated by reference the Magistrate's Report and Recommendation, stating, "the Magistrate Judge has accurately set forth the controlling principles of law and properly applied them to the particular facts of this case." Pet. App. 29a-30a.

Murphy's retaliatory-firing claim was then tried before a jury. The jury returned special verdicts in favor of the University, and the District Court found that the jury's

special verdicts were not against the clear weight of the evidence. The District Court denied Murphy's motion for a new trial. *Id.* 4a; Pet. 6.

The Sixth Circuit affirmed the District Court's decision granting summary judgment against Murphy's sex-discrimination claim. Pet. 17a. The Sixth Circuit also ruled that the District Court did not abuse its discretion when it denied Murphy's motion for a new trial on the retaliation claim. Murphy's petition for rehearing and suggestion for rehearing en banc was denied. Pet. 7.

The Sixth Circuit agreed with the District Court that Murphy failed to show that she was qualified, as she did not ever satisfy her employer's expectations. Pet. App. 10a. The court also agreed with the District Court that Murphy failed to show that she was treated differently from any similarly-situated male; the appeals court agreed that Assistant Coach Charlie Casuto was not comparable to Murphy. *Id.*

The panel seems to have simply (but incorrectly) assumed, however, that Murphy challenged her firing as part of her sex-discrimination claim. *Id.* 6a. The panel did not mention the District Court's finding that Murphy had not suffered any adverse action, nor did it mention that the Defendants challenged the existence of adverse action. Instead, the panel merely stated in passing that "being fired constitutes an adverse employment action," and it went on to address the other prongs of the prima facie test. Pet. App. 6a-7a. The parties had both briefed the adverse action issue, but the court did not discuss that dispute. Because discussion of the parties' briefs inherently requires more argumentative characterization of the dispute, that discussion is reserved for Part I of the argument below.

As detailed below, although she had presented only a retaliatory-termination claim, and not a discriminatory-

termination claim, Murphy's Petition centers almost entirely on a claim that she was fired because of her sex. Her Questions Presented, for example, refer to an alleged "link between the termination and gender," and to the "individual who terminated her employment." Pet., Questions Presented. Her Petition does not seek to revive the retaliation claim.

REASONS FOR DENYING THE WRIT

For several reasons, this case does not warrant the Court's review. First, Murphy did not pursue a discriminatory-firing claim in the District Court, and she cannot turn to such a claim on appeal. That lack of a firing claim undercuts the entire Petition. Second, even if Murphy's case is considered as a termination claim, it still does not warrant review. None of the Questions Presented are worthy of review, and in any case, this is a poor vehicle to review any issues that may exist.

I. This case is a flawed vehicle on all Questions Presented, as Murphy's discrimination claim does not challenge her termination, and she was never subjected to an adverse employment action to sustain her terms and conditions claim.

As detailed in the Counterstatement above, Murphy never claimed in the trial court that her employment was terminated because she is a woman. As explained below, Murphy does try to advance a discriminatory-termination claim in this Court, and indeed, she belatedly tried to do so in the Sixth Circuit, but such efforts cannot create such a claim on appeal. This hole in her case undercuts the entire Petition, for several reasons, such as Murphy's inability to show any adverse action without leaning on the termination. Finally, this is not a flaw that the Court could "work around" if review were granted, so the Court could not review this case without delving into this issue.

First, as the Counterstatement shows, Murphy's Amended Complaint left no doubt that she was *not* pursuing a discriminatory-firing claim, but was merely claiming sex discrimination in her pre-firing "terms and conditions," while her termination was linked solely to her independent retaliation claim. That approach was not an unreasonable strategy, for Murphy likely knew that a straight sex-based-firing claim would have run into several barriers. For example, Coach Hopkins hired Murphy and fired her just three months later, triggering the "same actor" inference—*i.e.*, the notion that discrimination is unlikely when the same actor hires and fires an employee, especially within a short time. *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461, 464 (6th Cir. 1995). Further, Murphy was replaced by a woman, and in fact, all of Hopkins's assistants in that position have been women. Pet. App. 11a; *id.* 18a (Boggs, J., concurring and stressing replacement issue as alternate ground for affirmance). Finally, it may have been a good strategy—especially with an eye to a jury trial—to advance the retaliation claim by consistently portraying the firing as a result of retaliatory motive, as opposed to portraying the firing as a result of both retaliation *and* as sex discrimination in the first place.

But whatever her motive behind this strategy, Murphy cannot seriously deny that her Amended Complaint conspicuously omitted a standard discriminatory-firing claim. If that complaint meant to state such a claim, then it seems curious indeed that her preliminary statement referred only to "terms and conditions," and that even her basis for jurisdiction referred to terms and conditions, but not to discharge. If the complaint meant to allege a sex-based firing, it is hard to understand why her detailed laundry list of discriminatory events included being called "stupid," and being told not to "get fat like the last girl," but *did not mention her termination.* Indeed, a typical complaint alleges

a firing as the gravamen of a count, and then lists such comments as *evidence* of bias, but Murphy listed the comments *as constituting the discrimination*.

The Magistrate (and the District Court by its adoption of the Magistrate's view) surely understood that Murphy rested her sex-discrimination claim on the pre-firing terms and conditions alone, and that is why the Magistrate was able to find that no adverse action occurred, despite the fact that Murphy's termination, of course, would easily qualify as an adverse action. *See* Pet. Supp. App. 16a.

To be sure, Murphy did try to belatedly and half-heartedly shift to a termination claim in the Sixth Circuit, but that effort is unavailing. First, her complaint plainly did not include such a claim, so nothing on appeal at any level could create one. Second, even if her complaint could be generously read to include such a claim, Murphy waived it when she did not object (in her objections in the District Court) to the Magistrate's finding that she had suffered no adverse employment action. The Magistrate specifically reasoned that Murphy relied on pre-firing events as alleged adverse action, and she fell short.

Murphy tried to explain away this problem in the Sixth Circuit, but her explanation is unpersuasive, and in fact, her Sixth Circuit briefing betrays her own likely understanding that she had not pleaded a termination claim. Murphy's opening brief, in urging that she had suffered an adverse action, first spent over four pages arguing that the non-firing activity amounted to concrete, adverse action, comparing her scenario to cases in which "hostility and professional snubbing" amounted to adverse action. *See* Appellant's Brief (in Sixth Circuit) at 19-23. After striving to bring her non-firing scenario under the umbrella of adverse action, Murphy concluded by comparing her "mistreatment" indirectly to "constructive discharge," and in

her *final* sentence, she threw in that "she was ultimately fired." *Id.* at 23. Had Murphy honestly believed that she had a valid discriminatory-firing claim, and in light of the plain fact that a firing is the gold standard of adverse action, it is absolutely mystifying why Murphy strained so hard to build an adverse action on the other grounds first, relegating the firing to a parting throwaway line.

Murphy's reply brief in the Sixth Circuit is equally inexplicable if she had a termination claim, but makes perfect sense if she had only a terms-and-conditions claim, and she knew that she was belatedly trying to shift gears. That reply *first* tried to defend the view that the non-firing actions were concrete enough on their own; again, that was a curious choice as a leading argument compared to the slam-dunk position that firing is an adverse action.

Then, in trying, as a *backup* position, to rely on termination-as-adverse-action, Murphy raised a truly incredible, and blatantly disingenuous, argument to counter the University's reminder (in our Appellee's Brief at 22-23) that she had waived any such claim when she did not raise the Magistrate's no-adverse-action holding in her Objections to the Report and Recommendation. Murphy claimed that she did not need to object because she had read the Magistrate's opinion to have ruled in *her favor* on the adverse action prong, because, in her view, the Magistrate had "believed the termination was an adverse action, but the other actions were not." *See* Murphy's Reply Brief at 6. "Accordingly, Mrs. Murphy only addressed what the Magistrate 'got wrong' in her Objections." *Id.* In fact, not only did Murphy feign surprise that anyone questioned that she had lost that prong, but she accused the University of being "disingenuous" for claiming otherwise. *Id.* at 6-7.

Murphy's claim—that she thought she had "won" the adverse-action prong—is outrageous because in every other

part of her Sixth Circuit briefs, she frankly acknowledged that she had *lost on that prong*. She said that the District Court found that "she was not subjected to an adverse action," Appellant's Br. at 9, and that the Court had "found that Mrs. Murphy had failed to establish three of the four prongs of the *prima facie* test." *Id.* at 15. And of course, Murphy included a whole section—in her opening brief, before the University addressed the issue in its brief—on the adverse action point. Thus, putting aside that the Magistrate's opinion on its own face rejects Murphy's revisionist account, Murphy's own briefing shows the absurdity of any claim that she had actually "won"—or even that she thought she had won—the adverse-action point.

Therefore, Murphy not only excluded a discriminatory-firing claim from her complaint, but even if she had such a claim there, she waived it after the Magistrate ruled against her on the adverse-action prong. All that she preserved was her insistence that the non-firing activity amounted to adverse action; she did not preserve any argument about the termination itself. Notably, Murphy does not, in this Court, continue to argue that the non-firing actions amount to adverse action. Thus, having unsuccessfully tried to switch to the termination theory in the Petition, she cannot switch back to the other-acts theory now, so she has no way to overcome her failure to show an adverse action, which the University would raise (if review were granted here) as a sure-fire alternate ground for affirmance.

This hole in Murphy's case undermines her entire Petition, as there is no way that she, nor the Court, could "work around" the problem. For example, her first Question Presented asks the Court to review what types of "direct evidence" allow a plaintiff to proceed to trial as an alternative to meeting the *prima facie* test. But her own Question refers to the "link between the termination and gender," and direct evidence has been described as evidence related to the

decisional process at issue. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J. concurring). With no termination claim, there is no "decision" to serve as a benchmark with which the "link" could be tethered. And if the Court accepts this case as a terms-only case, then the logic of this Question collapses on itself. That is because, in a terms-only case, the discriminatory decision is not the firing, but is presumably—if the direct evidence construct makes sense at all in a terms case—the decision to engage in the terms-based discriminatory conduct. Here, Murphy alleges that various inappropriate statements *are themselves the discriminatory conduct*, so the question seems to be whether Coach Hoskins's alleged comments are linked to the decision to make the comments. That is, of course, absurd.

Because of issues such as that, the Court cannot escape dealing with the issue of whether Murphy somehow has a termination claim; that is, the Court could not simply address Murphy's stated issues and then remand the "adverse action" issue, if Murphy were somehow to prevail in this Court. Murphy's questions, by linking to the termination, can only be evaluated if this Court first addresses *whether* Murphy has a termination claim. If the Court finds, as it surely would, that she does not, then it would have to try to resolve her remaining claims with the "terms" alone as the anchor, and that effort breaks down quickly.

Consequently, because the Petition would only make sense as a termination case, but Murphy does not actually have such a case, the Petition should be denied.

II. Even if Murphy's case is treated as raising a termination claim, none of her Questions Presented is worthy of the Court's review.

The University submits that, for the reasons in Part I above, Murphy's case cannot be read as maintaining a discriminatory termination claim, so the entire Petition collapses. Nevertheless, should the Court view her case as raising a termination claim, it should still decline to review this case. The Petition should be denied because none of the Questions Presented warrants review, and even if some interesting abstract issues are raised, this case is a poor vehicle for review.

A. Murphy's First Question Presented, regarding direct evidence, does not warrant review.

Murphy claims that the Court should address what type or degree of evidence qualifies as "direct evidence," so that a plaintiff may survive summary judgment without satisfying the more common *McDonnell Douglas* framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972). Murphy claims a split in the circuits, and a need to revisit the discussion of direct evidence, which was addressed by the Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003), and by Justice O'Connor's concurring opinion in *Price Waterhouse*, 490 U.S. 228, 277. *See* Pet. 7-9 (discussing cases in circuits).

This issue, however, does not warrant review for several reasons. First, the University acknowledges that the circuits may have used varying language in explaining the use of "direct evidence" as an alternate path to *McDonnell Douglas*, but that does not mean that the circuits have actually split in the results that they reach. The Sixth Circuit,

for example, has defined direct evidence of discrimination simply as "evidence [that] does not require a fact finder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003). Similarly, the Fifth, Ninth, and Eleventh Circuits have considered direct evidence to be that which is not circumstantial. *See* Pet. 8-9 (citing cases in those Circuits as representing "one side" of the alleged split).

The Second Circuit, which Murphy places on the alleged "other side" of the split, is actually in line with the Sixth Circuit. In the case that Murphy cites, *Rose v. New York City Board of Education*, 257 F.3d 156 (2nd Cir. 2001), a "mixed-motive" case, the court found that repeated remarks by an employer that he would replace plaintiff with someone "younger and cheaper" *were direct evidence* of age discrimination. *Id.* at 162. Such statements do not require an inference to show discrimination.

To be sure, the Third, Fourth, and Seventh Circuits, which Murphy categorizes as disagreeing with the Sixth Circuit and others, have suggested that courts should focus more on the *sufficiency* of evidence needed for a plaintiff to withstand summary judgment without using the *McDonnell Douglas* construct, rather than categorizing the *type* of evidence as direct or circumstantial. *see, e.g., Robin v. Espo Engineering Corp.*, 200 F.3d 1081 (7th Cir. 2000); *EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992); *Fakete v. Aetna, Inc.*, 308 F.3d 335 (3rd Cir. 2002). But those circuits' seemingly "more generous" standard has not made a difference for the plaintiffs in those cases, so the "split" may be one of form not substance. That is, several plaintiffs still did not survive summary judgment, even with the "broader" allowance of evidence considered. *See Robin*, 200 F.3d at 1089; *EEOC v. Clay Printing*, 955 F.2d at 941-43; *see also*

Mereish v. Walker, 359 F.3d 330, 340 (4th Cir. 2004); *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1111-12 (7th Cir. 1998).

In fact, the Third Circuit seems to be the sole circuit in which the court may have used a more generous standard, and in which a plaintiff survived summary judgment. *See Fakete*, 308 F.3d at 336. There, the court said "the adjective 'direct' is imprecise because certain circumstantial evidence is sufficient to shift the burden of proof regarding causation, if that evidence can fairly be said to *directly reflect* the alleged unlawful basis for the adverse employment decision." *Id.* at 339 (emphasis added) (internal quotes and citation omitted). Thus, while the court seemed to "add" circumstantial evidence to direct evidence, it also restricted plaintiffs to evidence that "directly reflects" the basis for the challenged decision. Equally important, the statements at issue in *Fakete* were linked to the challenged decision, as a supervisor, referring to likely upcoming changes under new management, said that the employer would be "looking for younger single people that will work unlimited hours," and that plaintiff "wouldn't be happy there in the future." *Id.* at 336. So, as in *Rose*, above, such a statement would satisfy what Murphy describe as the Sixth Circuit's more stringent direct evidence test.

Moreover, all of the cases cited as evidence of an alleged "split" were decided before this Court discussed "direct evidence" in *Desert Palace*. Those circuits cited by Murphy as more plaintiff-friendly have not addressed whether *Desert Palace* changes anything, but at least one of those circuits has suggested that it might re-review the matter in a proper case. *See Love-Lane v. Martin*, 355 F.3d 766, 786-87 (4th Cir. 2004) ("[t]o the extent that the Supreme Court's recent decision in [*Desert Palace*] might change the role that the *McDonnell Douglas* burden-shifting framework plays in race discrimination cases," any change would be

irrelevant to plaintiff's inability to withstand a motion for summary judgment).

Thus, this "split" may not exist, and if it does, it should percolate further. The courts of appeals should be allowed to weigh the impact of *Desert Palace*, and the Court should await a case in which a plaintiff's ability to "add" other evidence makes, or would make, a difference.

Equally important, even if this issue were worthy of review, this case is a poor vehicle to do so. Even apart from the conclusive flaw discussed above in Part I—*i.e.*, that Murphy does not present a termination claim here at all—Murphy's case, even considered as a termination case, is not a good one to review the scope or weight of evidence that might satisfy the "direct evidence" method of proof.

The statements that Murphy cites as direct evidence of discrimination would not qualify as direct under any standard, nor would they qualify as especially probative circumstantial evidence. The key to direct status, of course, is that the statements be made in connection with the challenged decision, which here—for argument's sake—is her termination. But none of the comments involved her termination, as all involved far more remote topics, such as Hopkins's alleged "disparaging remarks regarding the capacity of women to serve in the military," Pet. at 2, his alleged statement not to "get fat like the last girl," *id.* at 3, or his alleged comment that training on affirmative action was a "waste of time." Pet. App. 12a; *see* Pet. 1.

B. Neither the Second Question, regarding the "qualification" prong, nor the Third Question, regarding the "similarly situated" prong, warrants review.

Murphy also asks the Court to review two aspects of the four-prong test used to establish a *prima facie* case as the first step of the three-step *McDonnell Douglas* scheme. She asks the Court to examine what a plaintiff must show to establish that she is "qualified" for a job, and to review how "similar" a plaintiff's co-employee must be for purposes of showing that a "similarly-situated" employee outside a protected class was treated differently. Neither question warrants review.

First, the Sixth Circuit has not split from other circuits in how it applies the "qualified" prong. According to Murphy, the Sixth Circuit has "raised the bar" compared with other circuits, Pet. at 12, and "the Sixth Circuit failed to differentiate between objective and subjective qualifications." Pet. at 14. But, just last year, the Sixth Circuit held in an en banc case, *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 575 (6th Cir. 2003), that the inquiry "should focus on a plaintiff's objective qualifications." Murphy insists that the panel opinion here strayed from "objective" measurement in favor of subjective standards, Pet. at 14, but the panel never used the terms objective or subjective. The panel's decision is consistent with sticking to objective evidence, as it focused, not on some objective-subjective distinction, but on the fact that no evidence—objective or not—showed that the University was "ever happy with her performance once she commenced performance." *See* Pet. App. 10a. This unique situation, in which she had performance problems from the first day, differs greatly from those cases in which a court indicates that a once-qualified employee—as demonstrated by objective evidence such as positive reviews—should not be

considered to have lost that "qualified" status based on a later, disputed assessment. *See, e.g., Wexler*, 317 F.3d at 574-75 (rejecting claim that plaintiff, a store manager, was no longer qualified in light of declining sales in his location).

Conversely, if the decision below can be said to conflict with those *other* circuits outside the Sixth that insist on objective evidence—though again, that is not the case—then that "split" would equally exist between the unreported panel decision here and the Sixth Circuit's own standard in *Wexler*, which used the objective standard that Murphy apparently wants the Court to adopt here. Such a conflict, if it exists, would not warrant this Court's review, as *Wexler*, not this case, will govern future cases, and cases such as this are a matter for the Circuit's internal housekeeping through the *en banc* process.

Further, because of the nature of the three-step burden-shifting analysis, a circuit's approach to the "qualified" prong will not truly shift the outcome in most or all cases. All that changes is whether qualification issues are assessed under that prong or reserved for the pretext stage, but that does not change which plaintiffs will survive a summary judgment motion and go to trial. *See, e.g., Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 664 (6th Cir. 2000) (declining to hold lack of license against plaintiff under qualification prong, but noting that "her lack of a license comprises defendant's nondiscriminatory reason for firing her," and thus "she can not lose at the prima facie stage on that ground, even though she would lose on summary judgment anyway barring evidence showing discrimination."); *Flores v. Preferred Technical Group*, 182 F.3d 512 (7th Cir. 1999) (the court considered the qualification issue as part of the pretext stage, but plaintiff nonetheless lost on a motion for summary judgment).

Second, Murphy's third Question Presented, regarding the similarly situated prong, is equally unworthy of this Court's review. The Sixth Circuit has *explicitly rejected* the standard that Murphy claims it has embraced. In an effort to make the Sixth Circuit appear draconian, Murphy states that it and "several other circuits have taken the position that 'similarly situated' means having the same supervisor, the same standards, and the same conduct without any other mitigating circumstances," *See* Pet. at 18, citing *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). Murphy fails to mention, however, that *Mitchell* is not the Sixth Circuit's last word on the subject.

Instead, the Sixth Circuit's standard is enunciated in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998), a case ignored by Murphy, yet more favorable to plaintiffs than *Mitchell*.[2] Recognizing that language in *Mitchell* "appears to invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment," the court explains that, "*Mitchell* has not been so narrowly construed," citing *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994). *Ercegovich*, 154 F.3d at 352. *Ercegovich* affirms *Pierce's* standard that plaintiff is "simply 'required to prove that all of the *relevant* aspects of his employment situation were nearly identical to those of [the non-minority's] employment situation.'" (Emphasis in original; citation and internal quotation marks omitted.) *Id.*

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[2] Murphy's failure to mention *Ercegovich* in her Petition here is particularly puzzling, as she discussed it at length in her petition to the Sixth Circuit for rehearing/rehearing *en banc*. She vigorously argued that the court of appeals applied the wrong standard, and that the panel here required more than *Ercegovich* requires. Even if that were true, that would weigh against review here, as the reported *Ercegovich* decision represents the Sixth Circuit's view.

Murphy also mischaracterizes the analysis of the panel's decision below, which did, in fact, cite and apply *Ercegovich*. The panel noted Murphy's assertion that Casuto was a similarly situated male, because each was by superficial title alone, an assistant coach under Hopkins. But as the court explained: "However, this factor cannot be examined in a vacuum. 'Similarly-situated,' as a term of art, means similarly situated in all relevant aspects." Pet. App. 10a. The court then proceeded to determine whether Murphy and Coach Casuto were similar "in all relevant aspects," that is, aspects against which any alleged differences in treatment could be tested.

The court below correctly used the *Ercegovich* standard, and gave Murphy the benefit of a "reframing" of the fourth prong, given its conclusion that she held a unique position. Indeed, under the alternate fourth prong, Murphy would plainly fail, for she was replaced by a woman. Pet. App. 11a; *id.* at 18a (Boggs, J. concurring).

Nor do the cases cited by Murphy show any conflict among the circuits. Murphy claims that some circuits are "even more onerous" than the Sixth Circuit, because they use a "nearly identical" standard. Pet. at 18-19 citing *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (11th Cir. 1984) and *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086 (5th Cir. 1995). Murphy confuses, however, the context in which the phrase is used, by those courts. Both courts, like the Sixth Circuit in *Ercegovich*, the phrase "nearly identical" in conjunction with, not as opposed to, "all relevant aspects."

Further, even if some circuits seem to have moved the "similarly situated" prong from the prima facie stage to the pretext stage, *see* Pet. at 19, that does not change the outcome for a plaintiff, and the circuits remain consistent in the results

they reach. The same plaintiffs still go to trial, and the same plaintiffs fail to survive summary judgment. *See, e.g., Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220 (10th Cir. 2000) (plaintiff failed to survive summary judgment even though relieved of the requirement to present "comparative" evidence at the prima facie stage); *Kosereis v. State of Rhode Island*, 331 F.3d 207 (1st Cir. 2003).

Finally, on this issue as well, Murphy's case presents a poor vehicle for review. On top of the many flaws discussed above, her case is flawed regarding this specific issue because she did not even come close to being comparable to Casuto, the long-time, award-winning assistant coach. Whatever gray area might exist, if any, on the purported spectrum from broadly comparable to "nearly identical," Murphy was miles away from Casuto, and would fail any standard of comparability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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